Montana Law Review

Volume 71
Issue 1 *Winter 2010*

Article 8

1-2010

Recent Decisions Affecting the Montana Practitioner

LEGAL SHORTS:

RECENT DECISIONS AFFECTING THE MONTANA PRACTITIONER

I. *CANYON FERRY ROAD BAPTIST CHURCH OF EAST HELENA, INC. V. UNSWORTH*[1]

The Ninth Circuit Court of Appeals recently reversed the U.S. District Court of Montana and held that certain provisions of Montana's campaign finance laws violated the First Amendment rights of Canyon Ferry Road Baptist Church of East Helena.[2] The case focused on the Church's support of Constitutional Initiative No. 96 ("CI–96"), which defined marriage as a union between one man and one woman.[3] At issue was whether the State's campaign finance laws required the Church to disclose its activities in helping place CI–96 on the November 2004 state ballot.[4] The Alliance Defense Fund of Scottsdale, Arizona defended the Church and the National Legal Foundation of Virginia Beach, Virginia filed a brief as amicus curiae.[5]

Canyon Ferry arose after the Montana Commission of Political Practices ("Commission") ruled that the Church, in supporting CI–96 during 2004, had formed an "incidental political committee."[6] The Church had supported the ballot initiative by: (1) circulating the CI-96 petition among its congregants; (2) using its photocopying machine to make copies of the petition; (3) hosting and advertising a nationwide simulcast of a program entitled *Battle for Marriage* that supported the initiative; and (4) exhorting its congregants to sign the petition.[7] As an incidental political committee, the Church was required to report and disclose its campaign expenditures and contributions tied to CI–96.[8] In response to the Commission's ruling, the Church filed a civil action for deprivation of rights pursuant to 42 U.S.C. § 1983 (2006).[9]

The Church is an incorporated religious institution of the Baptist faith located in East Helena, Montana.[10] In the spring of 2004, Pastor Berthold Gotlieb Stumberg, III wanted to gather signatures for the CI–96 petition.[11]

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1. *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009).
2. *Id.* at 1034–1035.
3. *Id.* at 1024–1025.
4. *Id.* at 1028.
5. *Id.* at 1023.
6. *Id.* at 1025.
7. *Canyon Ferry*, 556 F.3d at 1024–1025.
8. *Id.* at 1025.
9. *Id.*
10. *Id.* at 1024.
11. *Id.*

To do so, the Pastor arranged for the Church to view an audio-simulcast screening of *Battle for Marriage*, a program featuring presentations from national religious leaders of the Christian faith on the subject of marriage.[12] The Church advertised its screening of the simulcast via free public service announcements through five local radio stations.[13] It also photocopied and distributed flyers for the event based on a template provided by the national organizers of *Battle for Marriage*.[14]

The simulcast was shown during one of the Church's regularly scheduled Sunday night services.[15] With 93 people attending, the crowd was much larger than a typical Sunday night service.[16] Following the screening, the Pastor spoke to the audience.[17] He exhorted them to resist the "threat to marriage" through prayer and by signing the CI–96 petition, which he indicated was available in the Church's foyer.[18] The Pastor gave two church members permission to place copies of the petition there.[19] One church member had used the Church's copy machine to make fewer than 50 copies of the petition, but used her own paper to do so.[20] A week later, the Pastor circulated the petitions in all three of its Sunday services.[21] Ultimately, 92 of the 98 signatures collected by the Church came from its own members.[22] With enough signatures statewide, CI–96 was included on the November 2004 state ballot and was passed by Montana voters by a 66.5% to 33.5% margin.[23] Three days after the Church screened *Battle for Marriage*, an advocacy group named Montanans for Families and Fairness filed a Campaign Finance and Practices Complaint with the Commission.[24] The organization alleged that the Church created an incidental political committee with its expenditures, but had failed to file the required disclosure forms.[25]

Under Montana law, a *political committee* is defined as "a combination of two or more individuals or a person other than an individual who makes a contribution or expenditure . . . to support or oppose a ballot issue or a committee organized to support or oppose a ballot issue . . . ."[26] An *inci-*

12. *Id.*
13. *Canyon Ferry*, 556 F.3d at 1024.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 1024–1025.
19. *Canyon Ferry*, 556 F.3d at 1024.
20. *Id.*
21. *Id.* at 1025.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Canyon Ferry*, 556 F.3d at 1025.
26. Mont. Code. Ann. § 13–1–101(20) (2007).

dental political committee is defined as "a political committee that is not specifically organized or maintained for the primary purpose of influencing elections, but that may incidentally become a political committee by making a contribution or expenditure to support or oppose a candidate and/or issue."[27] Additionally, an *in-kind expenditure* is "the furnishing of services, property, or rights without charge or at a charge which is less than fair market value to a person, candidate, or political committee for the purpose of supporting or opposing any person, candidate, ballot issue or political committee."[28] The Commission found the Church had indeed become an incidental political committee and was required to disclose its activities tied to supporting CI–96.[29] Following the ruling, the Church sued the Commission under 42 U.S.C § 1983.[30] It asserted that its ability to both educate congregants about marriage and to encourage them to promote their faith in public had been "severely chilled," in violation of the First and Fourteenth Amendments.[31]

United States District Court Judge Donald W. Molloy for the U.S. District Court of Montana granted the Defendant Commission's motion for summary judgment, thereby dismissing the Church's case.[32] The district court ruled the Church's First Amendment rights were not violated.[33] It held that Montana's campaign reporting requirements served a compelling state interest and that the requirements were narrowly tailored to achieve that interest.[34] The court reasoned that "nothing in the First Amendment keeps the state from exercising its regulatory authority over the political process, even when the politicking takes place in the 'sanctuary.'"[35] Furthermore, the disclosure laws were not unconstitutionally vague and imposed only a small burden that was "reasonable and non-discriminatory."[36] Lastly, the court did not deem it necessary to send the case to the Montana Supreme Court for certification concerning the statutory construction of the laws at issue.[37]

The Ninth Circuit Court of Appeals reversed and remanded the U.S. District Court's decision.[38] The court highlighted the fact that, as opposed

27. Admin. R. Mont. 44.10.327(2)(c) (2007).
28. *Id.* at 44.10.323(2).
29. *Canyon Ferry*, 556 F.3d at 1025.
30. *Id.*
31. *Canyon Ferry Rd. Baptist Church v. Higgins*, No. CV 04-24-H-DWM, slip op. at 1 (D. Mont. Sept. 26, 2006).
32. *Id.* at 16.
33. *Id.* at 1, 8, 10.
34. *Id.*
35. *Id.* at 1.
36. *Id.* at 13, 15.
37. *Higgins*, No. CV 04-24-H-DWM, slip op. at 15.
38. *Canyon Ferry*, 556 F.3d at 1034–1035.

to federal campaign finance laws, Montana's laws required disclosure for "*any* in-kind expenditure or contribution, no matter how negligible its value."[39] According to the court, providing and endorsing the CI–96 petitions were merely *de minimis* expenditures.[40] Therefore, requiring the Church to report these kinds of negligible expenditures would cause "fatal problems of unconstitutional vagueness."[41] Furthermore, the public's right to know of the Church's activities was outweighed by the Church's burden to disclose those activities.[42] In summary, the Ninth Circuit held that requiring the Church to report and disclose *de minimis* contributions in the context of a state ballot initiative violated the Church's First Amendment rights.[43]

The Montana practitioner and politically active groups in Montana should note the holding in *Canyon Ferry* was limited to disclosure requirements in the context of state ballot initiatives.[44] The Ninth Circuit did not rule on the constitutionality of Montana's disclosure requirements concerning candidate elections or monetary contributions of any size generally.[45] Moreover, the court refused to name a level above *de minimis* at which point it would be constitutional to require disclosure of in-kind contributions.[46] *Canyon Ferry* provides that a politically active group supporting a state ballot initiative is immune from Montana's disclosure requirements if its involvement does not significantly exceed that of the Church in this case. However, it is safe to say the same group contributing a substantially larger in-kind contribution would not enjoy the same level of immunity.

—Peter Arant

II. *ARIZONA V. GANT*[47]

In *Arizona v. Gant*, a 5-4 decision, the United States Supreme Court narrowed the circumstances that justify vehicle searches incident to arrest. The Court held this warrant exception is justified "only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the

39. *Id.* at 1029 (emphasis in original).
40. *Canyon Ferry*, 556 F.3d at 1030.
41. *Id.* at 1034.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Canyon Ferry*, 556 F.3d at 1034.
47. *Ariz. v. Gant*, 129 S. Ct. 1710 (2009).

offense of arrest."[48] The privilege of police to conduct a vehicle search incident to arrest is no longer automatic in the federal system.

The facts were simple. In August 1990, Tucson police officers went to a residence to investigate a tip that drugs were being sold there.[49] When they knocked, Gant answered the door, identified himself, and told the officers that the owner was not home.[50] The officers left and checked Gant's record; he had a suspended driver's license and an outstanding warrant for driving with a suspended license.[51] The officers returned to the house later that night and observed Gant drive up, park in the driveway, and step out of his vehicle.[52] They arrested him for driving on a suspended license and secured him in the back of a patrol car.[53] Two officers then conducted a warrantless search of his vehicle and found cocaine and a gun.[54]

Examining three prior cases, the United States Supreme Court laid out the modern requirements and scope of the federal warrant exception for vehicle searches incident to arrest. In *Chimel v. California*, the Court held that a search incident to arrest is justified only when reasonably necessary to protect officer safety or prevent an arrestee from hiding or destroying evidence of the offense of arrest.[55] These guidelines remained in place and provided the justification for vehicle searches incident to arrest in *New York v. Belton*;[56] however, the requirement that an arresttee be able to reach a weapon or evidence became more theoretical.[57] The *Belton* Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."[58] Most read this as a "bright-line rule" permitting police to search a recent occupant's vehicle, even if the arrestee could no longer access the vehicle.[59] In *Thornton v. U.S.*, the Court seemed to affirm this interpretation:

> To be sure, not all contraband in the passenger compartment is likely to be readily accessible to a "recent occupant." . . . The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which *Belton* enunciated.[60]

48. *Id.* at 1723.
49. *Id.* at 1714.
50. *Id.* at 1714–1715.
51. *Id.* at 1715.
52. *Id.*
53. *Gant*, 129 S. Ct. at 1715.
54. *Id.*
55. *Chimel v. Cal.*, 395 U.S. 752, 763 (1969).
56. *N.Y. v. Belton*, 453 U.S. 454, 460 n. 3 (1981).
57. *Id.* at 460.
58. *Id.*
59. *Gant*, 129 S. Ct. at 1718.
60. *Thornton v. U.S.*, 541 U.S. 615, 622–623 (2004).

Thornton, like Gant, was handcuffed in the back of a patrol car while his car was searched, and the Court upheld the search.[61] Because of these decisions, the warrant exception was widely considered automatic until *Arizona v. Gant.*

Gant moved to suppress the evidence from the search of his vehicle, arguing the search was not justified by *Chimel* because he could not have obtained weapons from his vehicle while handcuffed in the back of a patrol car.[62] Furthermore, the police officers could not have expected to find evidence of the crime for which he was arrested—driving with a suspended license—in his car.[63] Following the bright-line rule of *Belton*, the trial court rejected Gant's arguments.[64] A jury convicted Gant of possession of a narcotic drug for sale and possession of drug paraphernalia.[65]

On appeal, the Arizona Supreme Court reversed the trial court's decision.[66] The Court concluded that *Belton* did not address the issue of whether law enforcement could search a recent occupant's car after police had secured the scene.[67] The Court stated that once a scene is secure, the *Chimel* rationales no longer exist, and the warrant exception is not permitted.[68]

The United States Supreme Court granted the State's petition for certiorari in part because of the "chorus" of voices asking the Court to revisit its *Belton* and *Thornton* decisions.[69] Since *Belton*, courts of appeals had differed on whether it mattered if a recent occupant could actually access the vehicle at the time of the search, though most granted the exception even when the *Chimel* factors were a "fiction."[70] Critics expressed concern that the broad interpretation of *Belton* violated the Fourth Amendment by permitting police in the federal system, and in states that followed the federal system, to rifle through the belongings of anyone stopped for a traffic violation.[71] Many states, including Montana, declined to follow the federal

61. *Id.* at 618, 623–624.

62. *Gant*, 129 S. Ct. at 1715.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Gant*, 129 S. Ct. at 1716.

69. *Id.*

70. *Id.* at 1718 (referencing Justice Brennan's description of the *Belton* rule as relying on "a fiction—that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car," *Belton*, 453 U.S. at 466 (Brennan & Marshall, JJ., dissenting)).

71. *Id.* at 1720.

Court's example and continued to require that an arrestee be within reach of the vehicle.[72]

The United States Supreme Court's holding in *Gant* at least narrowed, and, according to the dissent, overruled *Belton* and *Thornton*.[73] The Court held that the *Chimel* rule only justifies a vehicle search incident to arrest if the risk to officers or evidence is genuine.[74] The Court noted that "[b]ecause officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains."[75]

In addition, however, the Court recognized a new justification for the warrant exception. The Court held that "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'"[76] The Court lifted this justification from Justice Scalia's concurrence in *Thornton*, where he suggested that *Belton* should be construed as allowing a vehicle search incident to arrest to find evidence related to the crime for which the arrest was made.[77]

Under the Court's new test for a vehicle search incident to arrest, the searches in *Belton* and *Thornton* would not be justified by *Chimel* but would be justified as evidentiary searches.[78] Because both Belton and Thornton were arrested on drug charges, it was reasonable for officers to believe that further evidence of their offenses would be found in their vehicles.[79] Gant, on the other hand, was arrested for a traffic offense, so it was not reasonable to believe that evidence of that offense would be found in his car.[80] Because he was securely in custody and could not access his car, the *Chimel* factors were not met either.[81] Thus, the warrantless search of Gant's car was illegal.

Justice Scalia concurred in the Court's decision, providing the crucial, fifth vote. He wrote separately to underscore his opinion that *Belton*'s bright-line rule was intentional and that the Court should "abandon the *Bel-*

72. *Id.* at 1721 n 8. Under Montana Code Annotated § 46–5–102 (2007), the grab area is "the area within a[n arrestee's] immediate presence."

73. *Id.* at 1726 (Alito, J., Roberts, C.J., & Kennedy, J., dissenting; Breyer, J., joining except as to part II-E).

74. *Gant*, 129 S. Ct. at 1721 (majority).

75. *Id.* at 1719 n. 4.

76. *Id.* at 1719 (quoting *Thornton*, 541 U.S. at 632 (Scalia & Ginsberg, JJ., concurring)).

77. *Thornton*, 541 U.S. at 630–631 (Scalia & Ginsberg, JJ., concurring).

78. *Gant*, 129 S. Ct. at 1719.

79. *Id.*

80. *Id.*

81. *Id.*

ton-Thornton charade of officer safety."[82] He would limit vehicle searches incident to arrest to cases where an officer reasonably believes evidence of the crime for which the arrest was made might be discovered in the vehicle or has probable cause that evidence of another crime will be discovered in the vehicle.[83] Because no other Justice wished to abandon *Chimel*, and because the Court was divided, Scalia chose to join the majority rather than dissent and leave the issue unresolved.[84]

The dissenting Justices argued that the Court's holding overruled constitutional precedents *sua sponte* and without justification.[85] Writing for the dissent, Justice Alito objected to the Court's reinterpretation of *Belton*, asserting that the common interpretation of *Belton*'s "bright-line rule" was intended by the *Belton* Court.[86] He argued that the rule should not have been abandoned because law enforcement had come to rely on it;[87] circumstances had not changed that made the rule unworkable;[88] the old rule was clearer and more applicable on the street than the new rule will be;[89] *Thornton* had recently affirmed the rule;[90] and *Belton* reasonably interpreted *Chimel*'s definition of the grab area as the area within reach at the time of arrest, rather than at the time of the search.[91] Justice Alito particularly condemned the Court's uncritical adoption of Justice Scalia's evidentiary rationale, raising several questions that will have to be answered in future cases.[92]

Gant, a 5-4 decision, signaled a significant departure from the past 40 years of vehicle-search-incident-to-arrest cases. The adoption of Justice Scalia's evidentiary rationale and the requirement that an arrestee be within reaching distance of the vehicle for the *Chimel* rationales to apply will certainly affect vehicle searches incident to arrest in the federal system.

The Montana practitioner should take note of the new scope for this warrant exception when practicing in federal court. The Montana practitioner should also be aware that several questions remain unanswered. What is the standard for an officer to "reasonably believe" that evidence of the crime of arrest will be found in a vehicle? When justified by the evi-

82. *Id.* at 1725 (Scalia, J., concurring).

83. *Id.*

84. *Gant*, 129 S. Ct. at 1725 (Scalia, J., concurring).

85. *Id.* at 1726, 1727 (Alito, J., Roberts, C.J., & Kennedy, J., dissenting; Breyer, J., joining except as to part II-E).

86. *Id.* at 1727.

87. *Id.* at 1728–1729.

88. *Id.*

89. *Id.*

90. *Gant*, 129 S. Ct. at 1729 (Alito, J., Roberts, C.J., & Kennedy, J., dissenting; Breyer, J., joining except as to part II-E).

91. *Id.* at 1729–1731 (Breyer, J., did not join this argument).

92. *Id.* at 1731.

dentiary search rationale, is a vehicle search still limited to the passenger compartment and the containers within it? Will this new rationale be extended to other searches incident to arrest? Finally, when considering the *Chimel* rationales, what is the extent of the grab area if an arrestee must be within "reaching distance" of the car? Does *Gant* call into question *Belton*'s decision that even locked containers in the passenger compartment may be searched? Finally, might an argument be made based on *Gant* that the area within an arrestee's "immediate presence" under Montana statute should be narrower? Time will tell.

—*Jori Frakie*

III. *BROWN V. STATE*[93]

Brown v. State rearticulated the standard of particularized suspicion by weakening the effect of an officer's experience on the propriety of an investigatory stop. In *Brown*, the Montana Supreme Court discussed the requirement that an "experienced" officer have particularized suspicion of criminal activity prior to performing an investigative stop.[94] The Court determined that past decisions misinterpreted the standard established in *U.S. v. Cortez*.[95] Based on the correct understanding of *Cortez*, particularized suspicion requires only that the information available to an officer be sufficient "to allow a hypothetical 'experienced' officer" to have particularized suspicion that an individual is engaged in criminal activity.[96]

Brown developed from an investigative stop performed in the early hours of June 10, 2007.[97] Around 2:50 a.m., Hill County Deputy Sheriff Stephen Martin witnessed a vehicle, barely moving along the roadway, suddenly pull over and turn off its lights.[98] Deputy Martin wondered if the vehicle was experiencing problems, pulled behind it, and approached the driver, David Brown.[99] As soon as Brown rolled down his window, Martin smelled alcohol.[100] Brown admitted to having been drinking but said he pulled over because he and his son had been fighting and his son had exited the vehicle.[101] Martin did not see any other individuals in the vicinity but observed a plastic Budweiser container in the cup holder and noticed that

93. *Brown v. State*, 203 P.3d 842 (Mont. 2009).
94. *Id.* at 844.
95. *Id.* at 845 (discussing *U.S. v. Cortez*, 449 U.S. 411 (1981)).
96. *Id.* at 846.
97. *Id.* at 843.
98. *Id.*
99. *Brown*, 203 P.3d at 843.
100. *Id.*
101. *Id.*

Brown was slurring his speech.[102] Consequently, Deputy Martin requested that Brown exit his vehicle and submit to a field sobriety test.[103] Martin performed a horizontal gaze nystagmus ("HGN") test and requested that Brown take a breathalyzer test.[104] When Brown refused to take the test, he was arrested for driving under the influence ("DUI") and transported to the Havre detention facility.[105] There, Deputy Martin again performed an HGN test, and Brown again refused to take a breathalyzer test.[106] Brown's license was suspended for refusing the breathalyzers under Montana Code Annotated § 61–8–402(4).[107]

Brown later petitioned to have his driver's license reinstated, contending that he had been illegally arrested.[108] He argued that Deputy Martin was too inexperienced to have had reasonable grounds to believe that Brown was driving under the influence of alcohol, as required to suspend his license.[109] First, Martin had been a police officer for less than one year and had conducted only four prior DUI investigations.[110] Second, the district court indicated that Martin had administered both HGN tests improperly and compromised the results.[111] Brown believed both circumstances proved that Martin lacked the experience, required by *State v. Gopher*, to establish a particularized suspicion that Brown was involved in criminal activity.[112] Brown pointed out that in adopting the particularized suspicion standard in *Gopher*, the Court commented that an officer's experience is an important element of the *Cortez* analysis.[113] The Court in *Gopher* emphasized that "experienced law enforcement authorities are allowed to draw certain conclusions which laymen could not properly draw."[114]

Here, the majority disagreed that Deputy Martin's level of experience was a determinative factor in proving whether the suspension of Brown's license was proper.[115] The Court observed that under Montana Code Annotated § 61–8–403(4)(a) a court will uphold the suspension of a driver's license if the arresting officer had "reasonable grounds" to believe that the person driving was under the influence of alcohol and refused to submit to

102. *Id.*
103. *Id.*
104. *Id.* at 844.
105. *Brown*, 203 P.3d at 844.
106. *Id.*
107. *Id.* (citing Mont. Code Ann. § 61–8–402(4) (2007)).
108. *Id.*
109. Apps.' Opening Br. at 10–12, *Brown v. State*, 203 P.3d 842 (Mont. 2009).
110. *Id.* at 14.
111. *Id.* at 8–9; *Brown*, 203 P.3d at 844.
112. *Id.* at 12–14 (referring to *State v. Gopher*, 631 P.2d 293 (Mont. 1981)).
113. *Id.* at 13–14 (citing *Gopher*, 631 P.2d at 295).
114. *Id.*; *Brown*, 203 P.3d at 846 (quoting *Gopher*, 631 P.2d at 295).
115. *Brown*, 203 P.3d at 845–846.

one or more sobriety tests.[116] Because the "reasonable grounds" requirement is equivalent to the "particularized suspicion" standard necessary to make an investigative stop under Montana Code Annotated § 46–5–401, a court will not overturn a license suspension if the arresting officer had a particularized suspicion that the person driving was under the influence of alcohol.[117] The Court explained that neither § 61–8–403 nor § 46–5–401 require an investigating officer to have certain training or experience.[118] Instead, that impression arose from the Court's previous misinterpretation of *United States v. Cortez*, from which the particularized suspicion standard was adopted.[119]

In *Cortez*, the United States Supreme Court set forth the following two-part test to determine if an investigative stop was proper:

> First, the assessment must be based upon all the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a *trained officer* draws inferences and makes deductions—inferences and deductions that might well elude an untrained person . . . . The second element . . . is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing.[120]

Based on this articulation of particularized suspicion, the *Brown* majority reasoned that it had inaccurately applied the standard in the past.[121] First, *Cortez* primarily referred to a "trained" officer.[122] The opinion only later referred to an experienced officer "in the context of what an 'experienced' officer might infer" from the circumstances.[123] Second, when *Gopher* adopted the particularized suspicion standard from *Cortez*, it erred by discussing the officer's experience. Although *Gopher*'s holding specifically held that "a trained police officer" must have particularized suspicion to perform an investigatory stop, the opinion also referenced an "experienced" officer several times.[124] Third, the Court compounded the problem in subsequent cases by looking at the officer's training and experience in analyzing whether particularized suspicion was present. For instance, in *State v. Schatz*, the Court discussed the officer's nine years of experience and concluded that the "*experienced* law enforcement officer had a 'particu-

116. *Id.* at 844.
117. *Id.* at 844–845.
118. *Id.* at 845.
119. *Id.*
120. *Id.* (quoting *Cortez*, 449 U.S. at 418) (emphasis in original).
121. *Brown*, 203 P.3d at 845.
122. *Id.*
123. *Id.*
124. *Id.* at 846 (quoting *Gopher*, 631 P.2d at 296).

larized suspicion' sufficient to effectuate" the arrest.[125] In *State v. Morsette*, the Court again referred to the officer's experience and discussed his training and years as an officer to analyze whether he was in fact "experienced."[126]

Despite these earlier misinterpretations, the majority stressed that no Montana statute requires an officer to have a specific amount of experience to establish particularized suspicion.[127] Based on this absence and the language of *Cortez*, the test for particularized suspicion requires only that "the information available to the investigating officer—whether a rookie or a veteran—be sufficient to allow a hypothetical 'experienced' officer to have either particularized suspicion for a stop, or probable cause for an arrest."[128] Instead of determining whether an officer had the relevant experience to establish particularized suspicion that a crime was being committed, a court should ascertain only whether the officer made reasonable inferences that a hypothetical experienced officer would make under the same circumstances.[129]

Brown, however, did not completely dispose of an officer's experience as a component of the particularized suspicion standard. The Court commented that an officer's experience could be a factor used to determine the reasonable inferences an officer can make from the circumstances.[130] While a rookie officer could establish particularized suspicion to pull over a vehicle driving slowly and weaving across the centerline, he might not be able to establish sufficient particularized suspicion under other circumstances that are "demonstrably beyond his or her training or experience."[131]

In review of Brown's appeal, the Court determined that Deputy Martin had correctly inferred from several observations that Brown was engaged in criminal activity.[132] From the vehicle's slow speed at 2:50 a.m. and its sudden move to pull over and turn off its lights, Martin could have reasonably suspected that the vehicle's driver was under the influence of alcohol in violation of Montana Code Annotated § 61–8–401.[133] Additionally, the odor of alcohol, Brown's slurred speech, and his explanation for pulling over when no other individual appeared anywhere nearby, were all objective observations that justified Martin's move from particularized suspicion

125. *Id.* at 846 (quoting *State v. Schatz*, 634 P.2d 1193 (Mont. 1981)) (emphasis in original).

126. *Id.* (quoting *State v. Morsette*, 654 P.2d 503 (Mont. 1982)).

127. *Brown*, 203 P.3d at 846.

128. *Id.*

129. *Id.*

130. *Id.* at 846–847.

131. *Id.* at 847.

132. *Id.*

133. *Brown*, 203 P.3d at 847.

to probable cause for the DUI arrest.[134] From these facts, Deputy Martin had reasonable grounds to revoke Brown's license under Montana Code Annotated § 61–8–403(4)(a).[135]

Brown is significant for its new articulation of the particularized suspicion standard required for an officer to make an investigative stop. As seen in *Brown*, this standard also applies to other realms such as the "reasonable grounds" needed to suspend an individual's license. When analyzing particularized suspicion, Montana courts will not look to whether an investigating officer is experienced, but whether the officer made inferences that a hypothetical, experienced officer would make under the same circumstances. Montana practitioners should be aware that an officer's experience is no longer a defining factor of particularized suspicion.

—*Erin Kraft*

IV. *Oregon Natural Desert Assn. v. Bureau of Land Management*[136]

In *Oregon Natural Desert Assn. v. Bureau of Land Management*, the Ninth Circuit Court of Appeals held that when the Bureau of Land Management ("BLM") revises its land use plans, wilderness characteristics[137] must be addressed.[138] As a result, wilderness characteristics must also be reviewed in the accompanying Environmental Impact Statement ("EIS"), as required by the National Environmental Policy Act ("NEPA").[139]

In order to grasp the impact of this decision, it is important to understand how the Federal Land Policy and Management Act ("FLPMA"), the Wilderness Act, and NEPA interact. FLPMA requires the BLM to "develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands."[140] Among other man-

134. *Id.*

135. *Id.*

136. *Or. Nat. Desert Assn. v. Bureau of Land Mgt.*, 531 F.3d 1114 (9th Cir. 2008).

137. Wilderness is defined as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal Land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value." *Id.* at 1118 (citing 16 U.S.C. § 1131(c) (2006)).

138. *Id.* at 1142–1143.

139. *Id.* at 1143.

140. *Id.* at 1117 (citing 43 U.S.C. § 1712(a)).

dates, land use plans are to "use and observe principles of multiple use and sustained yield."[141]

The Wilderness Act was designed to protect lands with wilderness characteristics.[142] However, the Wilderness Act does not address the BLM's management of federal lands.[143] Consequently, FLPMA, specifically § 1711(a), provides that "[t]he Secretary shall prepare and maintain on a continuing basis an inventory of all public lands and their resources and other values . . . ."[144] In addition, § 1782 of FLPMA requires the BLM to inventory lands with wilderness characteristics for permanent preservation.[145] Once the BLM completes the inventory, it recommends to the President which areas should be permanently protected.[146] The President then passes his recommendations to Congress, who decides which lands, if any, to designate as wilderness.[147]

NEPA requires agencies to complete an EIS to ensure the environmental impacts of the proposed action are analyzed and disclosed to the public.[148] The EIS must fully discuss all significant environmental impacts and provide any reasonable alternatives to the proposed action that would minimize adverse environmental impact.[149] Essentially, the agency must take a "hard look" at the environmental consequences of its proposed action.[150]

At issue in *Oregon Natural Desert Assn.* was the BLM's review and inventory of potential wilderness areas in approximately four-and-a-half million acres of Southeastern Oregon.[151] In 1980, the BLM identified 32 Wilderness Study Areas ("WSAs") in the planning area.[152] WSAs are areas that Congress has not yet approved for permanent preservation[153] that are managed under a non-impairment standard.[154] In 1989, the BLM recommended to the President that twenty one of the WSAs be permanently preserved as wilderness.[155] The President reported the BLM's recommendations to Congress unchanged; however, Congress has failed to act on the

141. *Id.* (citing 43 U.S.C. § 1712(c)(1)).
142. *Or. Nat. Desert Assn.*, 531 F.3d at 1118.
143. *Id.*
144. *Id.* at 1117 (citing 43 U.S.C. § 1711(a)).
145. *Id.* at 1118 (citing 43 U.S.C. § 1782(a)).
146. *Id.* (citing 43 U.S.C. § 1782(a)).
147. *Id.* at 1119 (citing 43 U.S.C. § 1782(a)).
148. *Or. Nat. Desert Assn.*, 531 F.3d at 1120.
149. *Id.* at 1121.
150. *Id.* at 1120.
151. *Id.* at 1116.
152. *Id.* at 1121.
153. *Id.* at 1119.
154. The non-impairment standard requires the BLM to manage the lands "so as not to impair the suitability of such areas for preservation as wilderness." *Or. Nat. Desert Assn.*, 531 F.3d at 1119 (citing 43 U.S.C. § 1782(c)).
155. *Id.* at 1121.

President's recommendations.[156] As a result, the WSAs are currently managed under the non-impairment standard.

In 1995, the BLM notified the public that it would be revising the Southeastern Oregon Management Plan ("Plan").[157] In 1998, it released the revised Plan to the public.[158] The Oregon Natural Desert Association ("ONDA") raised a number of concerns with the proposed Plan, most importantly that the BLM should re-inventory lands with wilderness characteristics because they had not done so since 1980.[159] ONDA argued that wilderness characteristics are among the values of public lands that the BLM has authority to manage under its multiple use mandate for land use plans.[160] Accordingly, ONDA asserted the BLM violated NEPA when it failed to discuss wilderness characteristics in the Plan's EIS.[161]

The BLM addressed a few of ONDA's concerns and released the final Plan and EIS in 2001.[162] However, the BLM did not address how the Plan would affect areas with wilderness characteristics not already designated as WSAs.[163] The BLM argued that wilderness characteristics are of no consequence aside from surveying lands to recommend for permanent preservation, as required by the § 1782 process.[164]

The Ninth Circuit disagreed with the BLM and concluded that its failure to consider wilderness characteristics in the Plan violated NEPA.[165] Read together, § 1782 and § 1711 of FLPMA require that the inventory process identify wilderness characteristics because wilderness characteristics are recognized by FLPMA as a "resource and other value."[166] Furthermore, the BLM's mandate to manage public lands for "sustained yield and multiple use" allows it to take wilderness characteristics into account when developing land use plans.[167] Thus, the Ninth Circuit concluded that "a landscape's wilderness characteristics generally must be considered in

156. *Id.*

157. *Id.*

158. *Id.* at 1122.

159. *Id.*

160. *Or. Nat. Desert Assn.*, 531 F.3d at 1131.

161. *Id.* at 1131.

162. *Id.* at 1122.

163. *Id.* at 1123.

164. *Id.*

165. *Id.* at 1133.

166. *Or. Nat. Desert Assn.*, 531 F.3d at 1119 (citing *Sierra Club v. Watt*, 608 F. Supp. 305, 309–310 (C.D. Cal. 1985) (describing the "inventory preparation requirement of [§ 1711]" as the first step in the wilderness review and designation process of § 1782); *Wilderness Socy.*, 119 Int. Bd. Land Apps. 168, 170–172 (U.S. Dept. Int. 1991) (discussing the wilderness process as occurring under both §§ 1711 and 1782).

167. *Id.* at 1135.

NEPA documents prepared for land use plans concerning the landscape, regardless of whether permanent wilderness preservation is an option."[168]

The BLM set forth three arguments in addition to its original position that it has no duty to address wilderness characteristics outside of the § 1782 process.[169] First, the BLM argued that according to the United States Supreme Court's holding in *Norton v. Southern Utah Wilderness Alliance*,[170] in order to file suit to compel an agency to take a particular action under 5 U.S.C. § 706(1) (1993), the plaintiff must assert the agency failed to take a discrete action that it is required to take.[171] The BLM argued that addressing wilderness characteristics in the land use planning process is not a discrete action it is required to take.[172] The court rejected this argument on the basis that ONDA did not file suit under 5 U.S.C. § 706(1); rather, it challenged the EIS under 5 U.S.C. § 706(2)(A) as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[173] The court concluded that ONDA's suit against the BLM satisfied the requirements of 5 U.S.C. § 706(2)(A).

Next, the BLM argued that the Supreme Court's holding in *Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council*,[174] prevents courts from directing agencies to use specific procedures to comply with NEPA.[175] In *Vermont Yankee* the Court held that "NEPA cannot serve as the basis for a substantial revision of the carefully constructed procedural specifications of the Administrative Procedures Act (APA)."[176] Therefore, a requirement that mandates the BLM to address wilderness characteristics would violate the holding in *Vermont Yankee*.[177] The Ninth Circuit also rejected this argument. It reasoned that requiring the BLM to comply with its NEPA obligations is consistent with the Court's holding in *Vermont Yankee* because the court is simply directing "compliance with a procedure that is required, namely, the EIS requirement."[178]

Lastly, the BLM argued that because it considered other resource values, such as animal habitat and visual resources, the consideration of these other values had the incidental effect of capturing wilderness characteristics.[179] Again, the Ninth Circuit found this argument unpersuasive. The

168. *Id.* at 1138.
169. *Id.* at 1139.
170. 542 U.S. 55 (2004).
171. *Or. Nat. Desert Assn.*, 531 F.3d at 1139.
172. *Id.*
173. *Id.*
174. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519 (1978).
175. *Or. Nat. Desert Assn.*, 531 F.3d at 1140.
176. *Id.* (quoting *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 548–549).
177. *Or. Nat. Desert Assn.*, 531 F.3d at 1140.
178. *Id.*
179. *Id.* at 1141.

BLM did not develop a methodology by which consideration of other resources could be used to analyze wilderness characteristics.[180] Instead, it set forth this reasoning in response to litigation.[181] In its EIS, the BLM simply denied it had any duty to address wilderness characteristics outside of the § 1782 process.[182]

After reviewing the BLM's three additional arguments, the Ninth Circuit reiterated its conclusion that the BLM cannot refuse to address wilderness characteristics when it is revising land use plans simply because it previously recommended lands for permanent preservation within the planning area.[183] That is, the BLM not only has a duty under § 1782 to analyze wilderness characteristics, but it also has a duty under § 1711 to consider wilderness characteristics in the land use planning process.[184] Thus, the court held the BLM did not comply with NEPA when it refused to analyze the Plan's impact on wilderness characteristics.[185]

This is the first time the Ninth Circuit has concluded that a federal agency must take wilderness characteristics into account when revising or developing land use plans. The significance of this decision is that it requires not only the BLM, but also the United States Forest Service, the National Parks Service, and the United States Fish and Wildlife Service, to address and respond to public comment concerning the protection of wilderness areas. These agencies can no longer refuse to consider the public's concern that wilderness areas on federal lands are not adequately protected. Additionally, the EIS requirement, which is subject to public comment, forces these federal agencies to discuss alternatives that would decrease the impact of their proposed action on areas with wilderness characteristics.

—Megan McCrae

V. *STATE V. ELLIS*[186]

In *State v. Ellis*, the Montana Supreme Court concluded that S.S., a thirteen-year-old victim of alleged sexual assault, could not give valid consent to the search of her bedroom in the defendant's home.[187] The Court affirmed the district court's ruling to suppress evidence—pajamas and bedding—seized in the defendant's home.[188] The Court reversed the suppres-

180. *Id.* at 1142.
181. *Id.*
182. *Id.*
183. *Or. Nat. Desert Assn.*, 531 F.3d at 1142–1143.
184. *Id.*
185. *Id.* at 1143.
186. *State v. Ellis*, 210 P.3d 144 (Mont. 2009).
187. *Id.* at 151.
188. *Id.* at 156.

sion ruling regarding S.S.'s underwear, concluding that the defendant "did not have an actual subjective expectation of privacy that society would find objectively reasonable."[189]

On October 5, 2006, Butte-Silver Bow Patrol Officer Dan Murphy responded to a report of sexual assault.[190] He met S.S., the victim, at the door of the residence of Dr. William Ellis, the defendant.[191] Murphy entered the living room of the residence and sat on the couch next to S.S.[192] Crying and upset, S.S. reported that her father, Ellis, inappropriately touched her on the previous evening.[193]

According to S.S., she had been sick the week leading up to the night of the alleged sexual assault; Ellis had twice given her medication that made her feel "goofy," and on the night of the incident, Ellis had given her some blue and pink pills.[194] S.S. reported she was sleeping when Ellis came into her room, removed her shirt, and pulled her pajama shorts and underwear down to her thighs.[195] He then masturbated while fondling her breasts and vagina.[196] Though she pretended to be asleep, she opened her eyes slightly to identify Ellis.[197] She saw that he was wearing a t-shirt and was nude from the waist down.[198] Ellis replaced her clothing, covered her back up with the bedding, and left.[199]

When Murphy realized he was dealing with a child-sexual-abuse crime, he requested a detective to complete the investigation.[200] While waiting for the detective to arrive, Murphy asked S.S. to show him where the alleged sexual assault occurred.[201] S.S. led Murphy to her bedroom and, at his request, retrieved her pajamas from the side of the bed.[202]

When Detective George Holland arrived, Murphy briefed Holland and showed him the bedroom, bedding, and pajamas.[203] Holland took photographs of S.S.'s bedroom.[204] They collected S.S.'s sheets, comforter, blanket, pajamas, and underwear.[205]

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189. *Id.*
190. *Id.* at 146.
191. *Id.*
192. *Ellis*, 210 P.3d at 146.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Ellis*, 210 P.3d at 146.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.* at 147.
204. *Ellis*, 210 P.3d at 147.
205. *Id.*

Defendant Ellis arrived at his home while Holland and Murphy were investigating.[206] Murphy removed Ellis from the home and transported him to the police station.[207] Ellis reported that he had given S.S. 12.5 milligrams of Ambien CR to help her sleep.[208] A drug test on S.S. revealed that she may have ingested about 50 to 60 milligrams of Ambien CR.[209] Ellis admitted he entered S.S.'s room to check on her but denied any sexual contact.[210] DNA tests on S.S.'s bedding revealed multiple semen samples containing Ellis's DNA.[211]

The State charged Ellis with felony sexual assault under Montana Code Annotated § 45–5–502(1)(3) (2005).[212] Ellis moved to suppress evidence seized from his home without a warrant or his consent.[213] The district court granted the motion to suppress.[214] The district court concluded that under *Schwarz*,[215] S.S. did not have the capacity or authority to consent to a valid search because she was a child under age 16.[216]

The State appealed, arguing that the *per se* rule in *Schwarz* did not apply because S.S. was the victim of a crime.[217] The State argued that, as a crime victim, she had authority to lead police to the scene of the alleged crime and had authority to turn over her pajamas, bedding, and underwear as evidence of that crime.[218]

The Montana Supreme Court refused to distinguish *Schwarz* and carve out a child-victim exception, reasoning that "a parent does not surrender the privacy of his home to the discretion of the child, but rather, 'the child has privacy at the discretion of the parent.'"[219] The Court focused "not on the general privacy rights of the child" but on "the violation of the privacy rights of the parent in the control of his or her home."[220] The Court concluded that "S.S. was not asserting her own constitutional rights; rather, she was attempting to waive her father's constitutional right to privacy."[221] Be-

206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Ellis*, 210 P.3d at 147.
211. *Id.*
212. *Id.*
213. *Id.* at 147–148.
214. *Id.* at 148.
215. *State v. Schwarz*, 136 P.3d 989 (Mont. 2006).
216. *Ellis*, 210 P.3d at 148.
217. *Id.* at 149.
218. *Id.* at 150–151.
219. *Id.* at 151 (citing *Schwarz*, 136 P.3d at 992).
220. *Id.*
221. *Id.*

cause S.S. could not give valid consent, the Court suppressed the evidence as the product of an illegal search and seizure.[222]

The Court rejected the State's assertion that its ruling would prevent law enforcement from responding to calls from child victims.[223] The Court acknowledged law enforcement's duty to investigate an alleged crime and secure potential evidence.[224] However, the Court reasoned the officers had ample time to secure a warrant, no exigent circumstances existed, Ellis was immediately taken into custody, the home could have been secured to prevent destruction of evidence, and neutral and detached magistrates would have been available to issue a search warrant.[225] The police did not attempt, or intend, to apply for a search warrant.[226] Accordingly, the Court concluded that no exception to the warrant requirement applied and the search and seizure were *per se* unreasonable.[227]

The Court maintained its hard-line rule that exceptions permitting a warrantless search will be "jealously guarded and carefully drawn."[228] Because the police "had every opportunity to obtain a warrant to seize evidence" and "chose the expedient route over the constitutional one," the Court flexed the might of the exclusionary rule and refused to create a fact-specific exception "to justify a palatable result in the hard case."[229]

Two Justices dissented and concluded that either Ellis did not have a reasonable expectation of privacy in his daughter's pajamas and bedding or, alternatively, a victim exception to the *Schwarz* rule should be adopted.[230] District Court Judge Richard A. Simonton also dissented and would have abandoned the *Schwarz* rule.[231] The Montana practitioner should be aware of the Montana Supreme Court's affirmation of the *Schwarz* rule and analytical focus on the adult's constitutional rights in cases where a minor consents to a search and seizure.

—Nick Lofing

222. *Ellis*, 210 P.3d at 156.
223. *Id.* at 151.
224. *Id.*
225. *Id.*
226. *Id.* at 155.
227. *Id.* at 158.
228. *Ellis*, 210 P.3d at 158.
229. *Id.* at 158–159.
230. *Id.* at 161.
231. *Id.* at 161–162.

VI. *STATE V. KALAL*[232]

In *State v. Kalal*, the Montana Supreme Court held that a victim of a criminal act has a duty to mitigate restitution damages and that such a duty is satisfied if the victim acted as a reasonable and prudent person would under the circumstances.[233] The mitigation of damages in the context of restitution for a criminal action was a case of first impression for the State of Montana.[234]

After being charged with theft of a tractor, Daniel Kalal pleaded guilty and received a two-year deferred imposition of his sentence, along with an order to pay restitution in the amount of $23,513.43 for the value of the tractor and other items of stolen property.[235] Kalal satisfied the restitution obligation but appealed the court order requiring him to pay additional restitution of $15,960 for the victim's lost income.[236]

The victim of the theft, Jim Petranek, testified that he planned on using the tractor for the income-generating purposes of: (1) building a two-and-a-half mile long fence, which "would allow his property to be leased for summer grazing," (2) constructing "a cabin which could be rented for 60 days a year," and (3) seeding "120 acres for grass production and farming."[237]

During the cross-examination of Petranek, Kalal argued that Petranek could rent another tractor for a reasonable price.[238] Kalal stated that "Petranek had a duty to mitigate his damages by renting a tractor" to complete his projects in the expected time frame.[239] However, because Petranek also worked full-time as a city public works specialist, Petranek would not have been able to complete his projects "in one continuous period of time."[240] Consequently, the district court concluded that the cost and effort to obtain a tractor was unreasonable.[241]

In determining the appropriate damages awarded, the district court cited the Montana Code Annotated, which defines the restitution and damages owed to the victim. Section 46–18–241 of the Montana Code Annotated provides: "a sentencing court shall, as part of the sentence, require an offender to make full restitution to any victim who has sustained pecuniary loss."[242] A pecuniary loss is defined as "all special damages . . . that a

232. *State v. Kalal*, 204 P.3d 1240 (Mont. 2009).
233. *Id.* at 1242.
234. *Id.* at 1241.
235. *Id.* at 1240.
236. *Id.*
237. *Id.* at 1240–1241.
238. *Kalal*, 204 P.3d at 1241.
239. *Id.*
240. *Id.*
241. *Id.*
242. Mont. Code Ann. § 46–18–241 (2007).

person could recover against the offender in a civil action arising out of the facts or events constituting the offender's criminal activities, including . . . loss of income."[243]

Because the relevant statutes requiring restitution in criminal actions "are based upon damages available in a 'civil action,'" the Court looked to the precedents set out in tort and contract law.[244] While an injured party has a duty to reduce or mitigate damages, that duty is not absolute; rather, "it has limits. The test is: What would an ordinarily prudent person be expected to do if capable, under the circumstances?"[245] In compliance with this test, an injured person does not have to mitigate when it is unreasonable or impracticable to do so.[246]

This issue of mitigation in *Kalal* is on point with the civil case of *McPherson v. Kerr*.[247] In *McPherson*, the plaintiff's trailer was used for a hauling job which the plaintiff had no knowledge of, and therefore, had not consented to.[248] In the process of this unauthorized job, the plaintiff's trailer suffered damage; it was then towed to a local storage place.[249] Although McPherson tried to release his trailer from storage, he lacked the funds to pay for the storage bill; however, McPherson was able to purchase another trailer, thus replacing the old one and enabling him to take on occasional jobs.[250] The district court concluded that McPherson acted in a reasonable manner to mitigate his damages, that "it was impossible for him to further mitigate," and that "the law would not require him to perform an impossibility."[251]

In *Kalal*, the Montana Supreme Court creates a clear precedent for the issue of restitution of victims in criminal actions. While the Court recognizes the duty to mitigate, it affirmed the district court's conclusion that "no reasonable man could be expected to spend money (or time) he does not have to mitigate an injury for which he is not responsible."[252] To expect anything more would be to further victimize the victim.

Montana practitioners should be aware of this case for the new authority it presents. While this case does not present a significant shift in criminal sentencing, it defines the scope of what a victim of a criminal action must do when that victim is seeking restitution from the guilty party. If a

243. *Id.* at § 46–18–243(1)(a).
244. *Kalal*, 204 P.3d at 1241.
245. *Spackman v. Ralph M. Parsons Co.*, 414 P.2d 918, 921 (Mont. 1966).
246. *Kalal*, 204 P.3d at 1242 (citing *McPherson v. Kerr*, 636 P.2d 852, 856 (Mont. 1981)).
247. 636 P.2d 852 (Mont. 1981).
248. *Id.* at 854.
249. *Id.* at 854.
250. *Id.*
251. *Id.*
252. *Kalal*, 204 P.3d at 1242.

victim wants to receive restitution, he or she must mitigate the damages enough to meet the civil standard of a reasonable and prudent person under the circumstances.

—Stephanie Mann

VII. *STATE v. RICKMAN*[253]

A Montana court sentenced Robert Rickman to life in prison for punching and tripping a man who was a Montana lawyer and Montana Supreme Court law clerk.[254] The Montana Supreme Court held this was not cruel and unusual punishment and that the trial court could consider retribution as a factor in sentencing and parole eligibility. Rickman received the same sentence as a co-defendant who stabbed the former law clerk in the back.[255] Notably, all the justices recused themselves from this case; however, the decision was unanimous among the assigned district court judges.[256]

On December 8, 2006, Robert Rickman and Travis Kirkbride sought someone to rob in Helena, Montana, so that they could purchase marijuana.[257] They eventually came upon the victim, Paul Raftery, and Rickman punched Raftery in the face.[258] Raftery then yelled for help and attempted to flee, but Kirkbride stabbed him in the back with a large knife.[259] Raftery again tried to get away, but Rickman tripped him.[260] Rickman then took Raftery's wallet and fled with Kirkbride.[261] Two people later heard Raftery's cries for help and called 9-1-1, but Raftery died on the way to St. Peter's Hospital.[262]

Rickman was later arrested and charged with deliberate homicide under Montana Code Annotated § 45–5–102(1)(b) (2007), otherwise known as the felony-murder statute.[263] Rickman pled guilty and the district court sentenced him to life in prison without parole eligibility for 55 years.[264] Rickman subsequently appealed to the Montana Supreme Court raising three issues concerning the district court's sentencing: cruel and un-

253. *State v. Rickman*, 183 P.3d 49 (Mont. 2008).
254. *Id.* at 53.
255. *Id.* at 56.
256. *Id.*
257. *Id.* at 51.
258. *Id.*
259. *Rickman*, 183 P.3d at 51.
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*

usual punishment, reliance on retribution as a factor, and the restriction on parole eligibility.[265]

Rickman first argued that his sentence constituted cruel and unusual punishment in violation of both the Eighth Amendment of the United States Constitution and Article II, § 22 of the Montana Constitution.[266] He asserted that his sentence was disproportionate to Kirkbride's, the co-defendant, because Rickman did not stab Raftery.[267] Rickman further contended that the disparity of his punishment was most discernable upon a historical review of felony murder sentences. Specifically, he noted that in the past decade, life sentences were given to defendants 23-years-old or younger only when they committed their crimes alone.[268]

The Court first noted that Rickman's sentence was within the statutory maximum guidelines, and therefore, presumably not cruel and unusual punishment.[269] The Court, however, acknowledged that an exception exists if a sentence "shocks the conscience and outrages the moral sense of the community or of justice."[270] In determining whether this exception applied, the Court considered the nature of the crime and the likelihood that the defendant would re-offend.[271]

The *Rickman* Court then described why it considered this crime particularly culpable; the defendants were seeking money for drugs, were not content with merely robbing the innocent victim, and ultimately left Raftery to die.[272] The district court also found significance in the random nature of the violent act and the fear-inducing effect it had on the citizens of Helena.[273] The Court next dismissed Rickman's argument that he was less culpable because he did not stab Raftery. The Court explained it was Rickman who approached the victim, Rickman who punched him, and Rickman who tripped Raftery after he had been stabbed.[274] Moreover, the sentencing transcript showed that Rickman encouraged Kirkbride to bring the knife to the robbery.[275]

After addressing the nature of the crime, the Court next found that Rickman was highly likely to re-offend.[276] The Court supported this assessment on the grounds that Rickman had been introduced to the juvenile

265. *Rickman*, 183 P.3d at 51.
266. *Id.* at 52.
267. *Id.*
268. *Id.*
269. *Id.* (citing *State v. Shults*, 136 P.3d 507, 513 (Mont. 2006)).
270. *Id.* (citing *State v. Wardell*, 122 P.3d 443, 448 (Mont. 2005)).
271. *Rickman*, 183 P.3d at 52–53.
272. *Id.* at 52.
273. *Id.* at 52.
274. *Id.* at 53.
275. *Id.*
276. *Id.*

justice system by the age of 12, and he had been adjudicated a juvenile delinquent by the age of 18.[277] Based on these facts, the Court held Rickman's sentence did not violate the prohibition against cruel and unusual punishment.[278]

Because the Court determined that Rickman's sentence did not shock the conscience, it declined to further address Rickman's argument that his punishment was disproportionate.[279] While the Court noted Rickman's historical contention, it followed prior precedent for non-death penalty cases by leaving "detailed proportionality analysis to the Sentence Review Board."[280]

The second issue appealed concerned whether a court could consider retribution as a factor in sentencing. Rickman argued that retribution could not be considered because that term is not contained in the Montana correctional and sentencing policies.[281] Rickman further contended that he was given the life sentence not because of his crime, but because of whom he committed it against; Raftery was a Montana attorney and Montana Supreme Court law clerk.[282]

The Court dismissed Rickman's contention because the district court was in compliance with the statutory scheme of sentencing, prior case law had acknowledged the use of retribution in sentencing, and retribution was not the primary focus of Rickman's sentence.

While the Court recognized the absence of the term "retribution" in the sentencing statutes, it noted the district court could consider a broad range of factors.[283] Montana Code Annotated § 46–18–101(2) states Montana's sentencing policy is to:

> (a) punish each offender commensurate with the nature and degree of harm caused by the offense and to hold an offender accountable;
> (b) protect the public, reduce crime, and increase the public sense of safety by incarcerating violent offenders and serious repeat offenders;
> (c) provide restitution, reparation, and restoration to the victim of the offense[.][284]

Moreover, the Court underscored that Montana Code Annotated § 46–18–115(4) permitted Raftery's family to testify directly to the district court regarding sentencing.[285] From these statutes, the Court found it was

277. *Rickman*, 183 P.3d at 53.
278. *Id.*
279. *Id.* at 52.
280. *Id.* at 53 (citing *Shults*, 136 P.3d at 513).
281. *Id.* (citing Mont. Code Ann. §§ 46–18–102(2); 46–18–101(3)).
282. *Id.*
283. *Rickman*, 183 P.3d at 53.
284. *Id.* (citing Mont. Code Ann. § 46–18–101(2)).
285. *Id.* at 54 (citing Mont. Code Ann. § 46–18–115(4)).

within the district court's wide latitude of discretion to assess the intricacies of the crime, the welfare of the community, and the resulting loss to Raftery's family.[286]

The Court buttressed its holding as to retribution by looking at prior case law. The Court cited five Montana Supreme Court cases as well as a United States Supreme Court decision all recognizing retribution as a proper element of punishment.[287]

The Court further noted that while the pre-sentence investigation report included Raftery's social status, the "'Evaluation/Recommendation'" section gave no reference to Raftery's position in the legal community.[288] The Court also found significant that retribution was only the third factor considered in sentencing; it was preceded by Rickman's lack of potential for rehabilitation as well as the substantial violent threat he posed to society.[289] Pursuant to this analysis, the Court held the district court did not abuse its discretion by considering retribution or the effect of the crime on Raftery's family in sentencing Rickman.[290]

Lastly, the Court addressed Rickman's third issue on appeal—whether the district court could impose a parole eligibility restriction for 55 years.[291] Rickman focused on the language of Montana Code Annotated § 46–18–202(2), which states, "the sentencing judge may also impose the restriction that the offender is ineligible for parole."[292] Based on this statute, Rickman contended that the judge can only allow Rickman to be eligible for parole or not, as opposed to some combination in between.[293]

The Court rejected this argument for four reasons. First, Montana Code Annotated § 46–18–202(1)(f) empowers trial court judges to attach to sentences "any other limitation reasonably related to the objectives of rehabilitation and protection of the victim and society."[294] Second, the Montana Supreme Court previously affirmed such a sentence in *State v. Thomas*, deeming it a "discretionary parole restriction."[295] Third, limiting sentencing judges to all or nothing parole restrictions runs contrary to Montana Code Annotated § 46–18–101(3)(d), which permits extensive "judicial dis-

286. *Id.*

287. *Id.* (citing *Matter of C.S.*, 687 P.2d 57, 59 (Mont. 1984); *Matter of B.L.T.*, 853 P.2d 1226, 1229 (Mont. 1993); *Fazier v. Mont. St. Dept. of Corrects.*, 920 P.2d 93, 96 (Mont. 1996); *State v. Nelson*, 910 P.2d 247, 250 (Mont. 1996); *State v. Mount*, 78 P.3d 829, 839 (Mont. 2003); *U.S. v. Halper*, 490 U.S. 435, 448 (1989)).

288. *Id.*

289. *Rickman*, 183 P.3d at 53.

290. *Id.* at 54.

291. *Id.*

292. *Id.* (citing Mont. Code Ann. § 46–18–202(2)).

293. *Id.*

294. *Id.* at 55 (quoting Mont. Code Ann. § 46–18–202(1)(f)).

295. *Rickman*, 183 P.3d at 55 (quoting *State v. Thomas*, 946 P.2d 140, 147 (Mont. 1997)).

cretion to consider aggravating and mitigating circumstances."[296] Finally, Montana's legislative inaction in banning partial eligibility restrictions caused the Court to presume the legislature approved of such restrictions.[297]

Accordingly, the Court upheld the district court's sentence and held the sentence did not constitute cruel and unusual punishment, retribution was permissibly considered, and the parole eligibility restriction was appropriate.[298]

Rickman, clarifies the sentencing structure for co-defendants who are found guilty of felony murder. Only time will tell, however, if Montana courts will continue to discard with leniency in assessing violent crimes resulting in tragic deaths. Questions also remain concerning the extent to which retribution may be considered. While the Court upheld retribution when it was the third factor in sentencing, would it have done the same if it was the first? Despite this uncertainty, the Montana Supreme Court has unequivocally approved parole eligibility restrictions imposed by district courts. Further, this case demonstrates that although the Montana criminal justice system presumably remains blind to a victim's identity and social status, it retains an acute sight to the nature of the crime and its impact on the victim's family.

—Karla Painter

VIII. *MARY J. BAKER REVOCABLE TRUST V. CENEX HARVEST STATES, COOPERATIVES, INC.*[299]

Before a contract term may be interpreted by a court, an ambiguity must exist.[300] But how does a court determine whether a term is ambiguous? Previously, Montana case law contained seemingly inconsistent holdings on whether extrinsic evidence could be considered to determine that a contract term was ambiguous.[301] In *Mary J. Baker Revocable Trust v. Cenex Harvest States, Cooperatives, Inc.* the Montana Supreme Court clarified that a judge could consider objective, extrinsic evidence to determine whether a contract term is ambiguous.[302]

The case involves a debate over the meaning of terms in a right-of-way agreement.[303] Cenex Harvest States, Cooperatives, Inc. and its subsidiary,

296. *Id.*
297. *Id.*
298. *Id.* at 56.
299. *Mary J. Baker Revocable Trust v. Cenex Harvest Sts., Coops., Inc.*, 164 P.3d 851 (Mont. 2007).
300. *Id.* at 857.
301. *Id.* at 862.
302. *Id.* at 866.
303. *Id.* at 856.

Front Range Pipeline, LLC., ("Cenex") acquired easements for the Front Range Pipeline, a 320-mile system of pipe that it would use to transport crude oil from Canada to Laurel, Montana.[304] For most of the distance, a 36-strand fiber optic cable was laid in the same trench as the pipeline.[305] In 1994 and 1995, Cenex entered right-of-way agreements with Linda Eklund and the Mary J. Baker Revocable Trust ("Landowners") to place the pipeline and cable on their lands.[306] The agreements specified that the pipeline would run on the Landowners' property "together with a buried fiber optic communications cable."[307] The agreements also stated "the rights herein granted may be assigned in whole or in part."[308]

In 2003, the Landowners sued Cenex for breach of the agreement because Cenex leased a portion of the fiber optic cable to TRI Touch America ("TRI").[309] The lease gave TRI exclusive use of 32 strands for 25 years with Cenex retaining the four other strands for their own use.[310] The Landowners argued the fiber optic lease exceeded the scope of the right-of-way agreement because they believed the agreement only allowed the cable to be used for monitoring the pipeline.[311] They claimed the TRI Lease was a revenue-producing scheme that constituted a conversion of money and trespass on the Landowners' property.[312] Both the Landowners and Cenex moved for summary judgment.[313]

Though the Landowners and Cenex both declared the granting language unambiguous, they disputed the meaning of the clause granting Cenex the right to bury the pipeline "together with" the fiber optic cable.[314] The Landowners argued that "together with" meant "in connection with," and, thus, the cable was supposed to be used "in connection with" the pipeline and limited to monitoring of the pipeline.[315] The Landowners also argued there were circumstances that supported their interpretation and argued that Montana Code Annotated § 1–4–102 (2007) gave the judge authority to consider the circumstances in interpreting the contract.[316] The statute states "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of

304. *Id.*
305. *Mary J. Baker Revocable Trust*, 164 P.3d at 855.
306. *Id.*
307. *Id.*
308. *Id.* at 855.
309. *Id.*
310. *Id.*
311. *Mary J. Baker Revocable Trust*, 164 P.3d at 855.
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.*
316. *Id.*

the instrument and of the parties to it, may also be shown so that the judge is placed in the position of those whose language the judge is to interpret."[317] In contrast, Cenex argued the contract did not limit the use of the fiber optic cable and gave Cenex the right to assign any rights within the contract to a third party.[318]

The district court agreed with Cenex and held the language was unambiguous and the contract did not limit the use of the fiber optic cable.[319] The district court also ruled Montana Code Annotated § 1–4–102 only allows judges to consider extrinsic circumstances if the contract language is ambiguous.[320] Since the judge held extrinsic evidence could not be considered, the district court awarded summary judgment to Cenex.[321]

The Landowners appealed to the Montana Supreme Court alleging in part that the district court failed to consider the circumstances under which the right-of-way agreements were drafted and granted.[322] In support of their position, they cited Montana Code Annotated § 1–4–102, claiming the statute allows a judge to take into account outside information when determining whether a contract is ambiguous.[323]

The Court noted that its previous decisions had taken contradictory stances on whether a contract must be ambiguous for § 1–4–102 to apply.[324] The Court clarified its position and held that § 1–4–102 allows a court to consider the circumstances in which the contract was made to determine whether a contract is in fact ambiguous.[325] However, the Court limited what evidence would be allowed. The Court stated:

> We emphasize, however, that not all "circumstances" are admissible for this purpose. . . . [A]n instrument does not contain an ambiguity simply because the parties have or suggest opposing interpretations thereof or disagree as to whether the language is reasonably open to just one interpretation. Rather, the determination of whether an ambiguity exists in a contract is made on an objective basis.[326]

The Court noted two advantages to allowing objective evidence while excluding subjective evidence. First, subjective evidence can be "self-serving" and "difficult to verify," but with objective evidence, "the ability of one of the contracting parties to fabricate such evidence is limited."[327] Sec-

317. Mont. Code Ann. § 1–4–102.
318. *Mary J. Baker Revocable Trust*, 164 P.3d at 856.
319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.* at 854.
323. *Id.*
324. *Mary J. Baker Revocable Trust*, 164 P.3d at 861.
325. *Id.* at 866.
326. *Id.*
327. *Id.*

ond, subjective evidence creates a fact question that must be brought before a jury.[328] By limiting evidence to objective evidence, a judge can act as a gatekeeper.[329]

The Court outlined the process for how courts should use extrinsic evidence for contract interpretation:

> [T]he evidence is considered by the court to enable it to determine whether the contract or clause is ambiguous; if it is not, the inquiry ends and parol evidence is kept from the jury. If, however, the judge is convinced by the extrinsic evidence that an ambiguity exists, the evidence is presented to the jury so that it may determine, on the basis of the written contract, as explained or supplemented by the extrinsic evidence, which of two or more meanings the parties intended.[330]

After clarifying its position on the application of § 1–4–102, the Court held that because the Landowners and Cenex agreed the language was unambiguous, there was no need to consider extrinsic evidence to determine whether an ambiguity existed.[331] Without admissible evidence to the contrary, the Court determined the clause was not ambiguous and that the district court had not erred in determining there was no genuine issue of material fact.[332]

In *Mary J. Baker Revocable Trust*, the Montana Supreme Court provided a clear standard for determining whether a contract is ambiguous. While allowing extrinsic evidence to prove an ambiguity, the Court explicitly excluded subjective evidence. By doing so, the Court allowed for extrinsic evidence while preventing every contract dispute from becoming a question of fact.

—Scott Peterson

IX. *OLSON V. SHUMAKER TRUCKING & EXCAVATING CONTRACTORS, INC.*[333]

The Montana Supreme Court recently held that defendants who owe a nondelegable duty in personal injury claims may raise the defense of comparative negligence when either element of a two-pronged test is satisfied.[334]

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328. *Id.*

329. *Id.*

330. *Mary J. Revocable Trust*, 164 P.3d at 866 (citing Richard A. Lord, *Williston on Contracts* vol. 11, § 33:39, 815–816 (4th ed., West 1999)).

331. *Id.* at 870.

332. *Id.* at 872.

333. *Olson v. Shumaker Trucking & Excavating Contractors, Inc.*, 196 P.3d 1265 (Mont. 2008).

334. *Id.* at 1277–1278.

The majority opinion in *Olson* was written by Justice Morris. Justices Leaphart and Warner concurred, as did Chief Justice Gray. Justice Nelson dissented with the majority's view on the role of contributory negligence as a defense in claims arising under nondelegable duties.

Balfour Beatty Rail, Inc. employed the plaintiff, Corey Olson, as a jobsite laborer in Great Falls, Montana.[335] Balfour was a subcontractor for Shumaker Trucking & Excavating Contractors, Inc. ("Shumaker"), which contracted with the Great Falls Development Authority ("GFDA") to build a rail line.[336] Balfour's jobsite was located "some distance" from its employee parking lot.[337] Since neither company provided transportation between the two areas, workers frequently rode back and forth on whatever means were available—including the bucket of a front-end loader.[338]

Olson was injured at the end of his workday while riding from the jobsite to the employee parking area in a loader bucket.[339] Another laborer, who was in the loader's cab, mistakenly actuated one of the bucket's hydraulic controls.[340] The bucket fell on Olson's right leg, immediately causing serious physical injuries and, later, post-traumatic stress disorder ("PTSD").[341] Olson elected to ride in the front-end loader even though his supervisor had informed him he would return to the jobsite shortly with a pickup truck to give Olson a ride to the parking lot.[342] Prior to the accident, "Olson had been aware of Shumaker's safety policy barring employees . . . from riding on construction equipment."[343]

Olson sued Shumaker, alleging the company was negligent for failing to provide Balfour's workers with safe jobsite transportation.[344] Before trial, the court granted Olson summary judgment on the issues of duty and breach.[345] The district court also found that the nondelegable duty that Shumaker owed to Olson stemmed from both Shumaker's contract with the GFDA and the Montana Safety Act.[346]

Subsequently, Olson moved for summary judgment on the issue of contributory negligence, arguing that Shumaker could not introduce evidence of contributory negligence by an injured employee when the em-

335. *Id.* at 1268.
336. *Id.*
337. *Id.*
338. *Id.*
339. *Olson*, 196 P.3d at 1268.
340. *Id.*
341. *Id.*
342. *Id.*
343. *Id.* at 1277–1278.
344. *Id.* at 1268.
345. *Olson*, 196 P.3d at 1268–1269.
346. *Id.* at 1269.

ployer had breached a nondelegable duty.[347] The district court denied Olson's motion, determining that:

> contributory negligence does not constitute delegation or transfer of a nondelegable duty [and that] negligence per se under the Montana Safety Act, arising from a breach of a nondelegable contract duty, does not preclude comparison and apportionment of contributory negligence as a matter of law in all cases.[348]

The case proceeded to trial.

At the close of trial, a jury awarded Olson $1,044,773.[349] However, the jury also found that Olson was ten-percent negligent.[350] Thus, his award was reduced to $940,296. Olson appealed the district court's decision to allow the defense of contributory negligence.[351]

On appeal, Olson argued that the district court improperly delegated Shumaker's nondelegable duty when it denied his motion for summary judgment on the defense of contributory negligence.[352]

Prior to *Olson v. Schumaker*, Montana's longstanding nondelegable duty rule prevented any duty-shifting in circumstances where the defendant owed the plaintiff a nondelegable duty.[353] In particular, "where a nondelegable duty to provide a safe work environment exists, the general contractor 'cannot evade liability by employing another to do that which he has agreed to perform.' "[354]

Before undertaking an analysis of Olson's argument, the Supreme Court observed that the "statutory nondelegable duty arising from the Montana Safety Act stands in tension with the general duty to avoid harm to oneself under [Montana's] Contributory Negligence Statute."[355] The Court also noted that it had yet to be faced with a case directly addressing this relationship.[356]

In determining that contributory negligence remained available as a defense to Shumaker, the district court relied on *Shannon v. Howard S. Wight Construction Co.*[357] and *Stepanek v. Kober Construction*.[358] The dis-

347. *Id.*

348. *Id.*

349. *Id.* at 1270.

350. *Id.* at 1270.

351. *Olson*, 196 P.3d at 1270–1272.

352. *Id.* at 1275.

353. *Ulmen v. Schweiger*, 12 P.2d 856, 860 (Mont. 1932).

354. *Olson*, 196 P.3d at 1275 (citing *Ulmen*, 12 P.2d at 860).

355. *Id.*

356. *Id.*

357. *Id.* at 1275–1276 (citing *Shannon v. Howard S. Wight Constr. Co*, 593 P.2d 438, 445–446 (Mont. 1979)).

358. *Id.* (citing *Stepanek v. Kober Constr.*, 625 P.2d 51, 56 (Mont. 1981)).

trict court found that, taken together, these two cases implied the following rule:

> [C]ontributory or comparative negligence remains available to the defendant if evidence exists demonstrating that: (1) the worker has a reasonable means or opportunity to avoid the hazard without endangering his or her employment; or (2) the subject harm was not a reasonably foreseeable consequence of the contractor's breach of a nondelegable safety duty.[359]

Since the district court had determined that Shumaker was negligent per se under the Montana Safety Act, the Court focused its primary analysis on the role of comparative negligence in negligence per se claims.[360] The Court noted that, in a negligence per se claim, "[the] plaintiff must still prove causation before she may recover,"[361] and that the existence of contributory negligence in a negligence per se claim is usually a factual question.[362]

Approving the district court's handling of the case, the Montana Supreme Court adopted the two-part, *Shannon-Stepanek* test that the district court had developed, which provided that comparative negligence remained available as a defense in negligence claims involving a nondelegable duty when either of the two prongs is satisfied.[363]

Justice Nelson viewed the majority's interpretation as a "sea change in the law governing a contractor's breach of its contractually-assumed, nondelegable duty of safety to employees."[364] His dissent expressed a distinct concern that allowing contributory negligence as a defense in workplace claims will serve as an incentive for contractors to pass undue responsibility for workplace safety onto their laborers, "the very persons that the nondelegable-duty doctrine was designed to protect."[365]

In agreeing with Olson's apportionment argument,[366] Nelson also took into account several facts that the majority did not mention. At the time of the injury, Olson was 18-years-old and a new employee.[367] He had previously been instructed to follow the lead of a co-worker, and the co-worker climbed aboard the loader before Olson.[368] Finally, the dissent emphasized that the injury occurred at the end of a long and exhausting workday—a

359. *Id.* at 1276.

360. *Olson*, 196 P.3d at 1277.

361. *Id.* (citing *Est. of Schwabe v. Custer's Inn*, 15 P.3d 903, 909 (Mont. 2000) (overruled on other grounds); *Giambra v. Kelsey*, 162 P.3d 134, 147 (Mont. 2007)).

362. *Id.* (citing *Pierce v. ALSC Architects, P.S.*, 890 P.2d 1254, 1260 (Mont. 1995)).

363. *Id.* at 1278.

364. *Id.* at 1278 (Nelson, J., dissenting).

365. *Id.*

366. *Olson*, 196 P.3d at 1278 (Nelson, J., dissenting).

367. *Id.* at 1279.

368. *Id.*

time when an employee is likely to ride (instead of walk) to a distant parking area if given the choice.[369]

The dissent summarized its opinion, and stated that, "the only reason Olson was put into the position of being transported in the front-end loader was because Shumaker undisputedly abdicated and breached its nondelegable duty to supervise safety and provide safe transportation."[370]

While only the passage of time will show if Justice Nelson's concerns prove prescient, for now, the Court's holding on the role of comparative negligence in nondelegable duty claims is likely a cost-saving victory for the State's contracting businesses and their insurers. Regardless of one's opinion of the majority ruling, *Olson* brings clarity to an area of Montana law.

One subtle portion of this case that may prove important is the Court's broad interpretation of Montana's comparative negligence scheme[371] as creating a "duty to avoid."[372] The "duty to avoid" will certainly be cited by defendants in other types of claims, such as premises liability and vehicular negligence. In turn, plaintiffs will likely argue that this portion of the *Olson* opinion is dicta, or that the "duty to avoid" is limited to workplace negligence actions.

—Joseph M. Ransmeier

X. *STATE V. HILGENDORF*[373]

To justify an investigative stop of an automobile, the State must show that under the totality of the circumstances at the time of the stop, sufficient objective data was available to create particularized suspicion that an "occupant of the vehicle has committed, is committing, or is about to commit an offense."[374] However, the Montana Supreme Court recently held that observing occupants who were "busy moving around inside [a] vehicle" that was parked in a high crime area was sufficient to establish particularized suspicion.[375] The Court also held that the contents of a closed container found on the driver's person during a warrantless search incident to arrest were admissible under the inevitable discovery doctrine.[376] This decision raises serious questions about the future of Montana's exigent circum-

369. *Id.*
370. *Id.* at 1280.
371. Mont. Code Ann. § 27-1-702 (2007).
372. *Olson*, 196 P.3d 1275 (majority).
373. *State v. Hilgendorf*, 208 P.3d 401 (Mont. 2009).
374. Mont. Code Ann. § 46-5-401(1) (2009).
375. *Hilgendorf*, 208 P.3d at 405.
376. *Id.* at 406.

stances requirement for warrantless searches incident to arrest and also illustrates the Court's relaxation of the particularized suspicion requirement.

On March 16, 2007, at approximately 2:00 a.m., Deputy Chris Romero observed a vehicle parked next to a business with its engine running and lights on.[377] The vehicle was parked in an area that had been experiencing an increase in theft and burglary.[378] When Romero's headlights illuminated the rear of the vehicle a second time, the driver "immediately pulled out and quickly drove away."[379] As he followed the vehicle, Romero observed the occupants moving around "as if they were trying to conceal something[,]" which prompted him to initiate a stop.[380]

The vehicle was occupied by Mark Hilgendorf and a passenger.[381] After obtaining identification from the two, Romero returned to his patrol car to check for outstanding warrants.[382] He was interrupted, however, when the passenger began "opening and closing the door on his side as if attempting to discard something [and causing] Romero concern for his safety."[383] Romero returned to the vehicle and asked the passenger to exit.[384] A pat-down search of the passenger yielded a small orange container, which the passenger "promptly admitted contained drugs."[385] After arresting the passenger for possession of drug paraphernalia, Romero searched Hilgendorf and discovered "an orange container identical to the one found on the passenger."[386] Romero then opened the container, revealing a crystal powder, a razor blade, and marijuana.[387]

On March 20, 2007, the State charged Hilgendorf with two counts of criminal possession of dangerous drugs and criminal possession of drug paraphernalia.[388] On May 22, Hilgendorf moved the district court to suppress the drugs and drug paraphernalia, as well as any statements made by him or his passenger.[389] Hilgendorf contended that Romero lacked particularized suspicion to conduct the investigatory stop and had unlawfully examined the contents of the orange container without a warrant.[390]

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377. *Id.* at 402–403.
378. *Id.* at 403.
379. *Id.*
380. *Id.*
381. *Hilgendorf*, 208 P.3d at 403.
382. *Id.*
383. *Id.*
384. *Id.*
385. *Id.*
386. *Id.*
387. *Hilgendorf*, 208 P.3d at 403.
388. *Id.*
389. *Id.*
390. *Id.*

On July 27, the district court denied Hilgendorf's motion to suppress.[391] The court held that Romero had particularized suspicion to legally effectuate the stop and that the contents of Hilgendorf's orange container would inevitably be discovered during an inventory search subsequent to his arrest.[392] On August 28, Hilgendorf pled guilty to all charges against him but reserved his right to appeal the court's denial of his motion.[393] Pursuant to his plea agreement, Hilgendorf appealed the denial of his motion to suppress.[394]

On appeal, Hilgendorf relied on the Court's holdings in *State v. Reynolds* and *State v. Jarman*, arguing that Romero lacked particularized suspicion under the totality of the circumstances test.[395] In *Reynolds*, the Court held there was no particularized suspicion when an officer observed a driver "bordering on travelling a little too fast," and who may have been unnerved by the presence of the police officer.[396] Hilgendorf cited *Jarman*[397] for the proposition "that [b]eing in a high crime area by itself could not establish particularized suspicion."[398]

The Court disagreed. It distinguished Hilgendorf's facts from *Reynolds* and *Jarman* by citing Romero's observation of the occupants moving around, "as if trying to conceal something in the vehicle."[399] Romero testified that Hilgendorf and his passenger were taking actions "a normal person wouldn't," which led him to believe "there could be something going on, like somebody committing a theft."[400] Although Romero's suspicions lacked specificity, the Court concluded that the occupants' odd behavior, combined with Romero's initial observations, were sufficient objective data from which he "could make inferences about the possibility of a crime and come to a resulting suspicion that a theft could be in progress."[401]

Under the Montana and United States Constitutions, a warrantless search is per se illegal unless accompanied by an exception such as exigent circumstances.[402] If the State is unable to articulate an exception, the evidence must be suppressed.[403] Hilgendorf argued that no such exception

391. *Id.*
392. *Id.* at 405.
393. *Hilgendorf*, 208 P.3d at 403.
394. *Id.*
395. *Id.* at 404–405 (citing *State v. Reynolds*, 899 P.2d 540 (Mont. 1995); *State v. Jarman*, 967 P.2d 1099 (Mont. 1998)).
396. *Reynolds*, 899 P.2d at 543.
397. *Jarman*, 967 P.2d at 1101.
398. *Hilgendorf*, 208 P.3d at 404 (citing *Jarman*, 967 P.2d at 1101).
399. *Id.* at 405.
400. *Id.*
401. *Id.*
402. *Id.* (citing *State v. Hamilton*, 67 P.3d 871, 874 (Mont. 2003)).
403. *Id.* (citing *Wong Sun v. U.S.*, 371 U.S. 471, 484–485 (1963)).

existed and that the arresting officers should have obtained a warrant before searching him.[404] As a result, Hilgendorf argued the search was illegal and the contents of the container should have been suppressed.[405]

The Court, however, agreed with the State's contention that the inevitable discovery doctrine applied.[406] The Court did not dispute that Hilgendorf would have been subjected to the standard inventory search during booking.[407] And because an inventory search would have revealed the contents of the container, it concluded that the inevitable discovery doctrine applied.[408]

In his dissent, Justice Leaphart disagreed with the majority's findings on the issue of particularized suspicion, arguing that the "totality of the circumstances confronting Officer Romero at the time of the stop did not create an objective basis for suspecting criminal activity."[409] Leaphart agreed with Hilgendorf's interpretations of *Reynolds* and *Jarman* and found the facts in this case "even less 'particularized' [than those in *Reynolds*,] since Officer Romero was not responding to any specific crime report."[410] Leaphart concluded by emphasizing that a "general suspicion of criminal activity" is insufficient to satisfy the particularized suspicion requirement.[411] Justice Nelson joined the dissent.

Prior to *Hilgendorf*, the scope of warrantless searches incident to arrest was limited to the extent necessary to ensure the officer's safety and prevent the arrestee's escape, unless exigent circumstances justified a more intrusive search. This limitation reflected the Court's preference for evidence obtained through the execution of a valid search warrant. The Court's decision in *Hilgendorf*, however, ostensibly renders ineffectual any restrictions on the scope of searches incident to arrest by establishing another avenue for the introduction of evidence. It is unclear whether the Court's decision in *Hilgendorf* effectively abolishes the exigent circumstances requirement or whether it simply broadens the scope of the inevitable discovery doctrine in Montana.

Additionally, the liberal interpretation of particularized suspicion utilized in *Hilgendorf* indicates the Court's willingness to relax the once rigid constraints imposed on law enforcement by the Fourth Amendment. In expanding particularized suspicion to include more generalized suspicions, the

404. *Hilgendorf*, 208 P.3d at 405 (citing *Wong Sun*, 371 U.S. at 484–485).

405. *Id.*

406. *Id.* at 406.

407. *Id.*

408. *Id.*

409. *Id.* at 407 (citing *State v. Van Kirk*, 32 P.3d 735 (Mont. 2001)).

410. *Hilgendorf*, 208 P.3d at 407.

411. *Id.*

Court effectively retreats from its role as objective arbiter reconciling the interests of law enforcement with the rights of the accused.

—Bryan Spoon

XI. *KULSTAD v. MANIACI*[412]

In *Kulstad v. Maniaci*, the Montana Supreme Court affirmed Montana's commitment to protect the constitutional rights of children. The Court upheld Montana Code Annotated § 40–4–228 by granting a former lesbian partner a parental interest in the two adopted children she helped raise. This statute balances the rights of children with the rights of parents in determining who may be awarded a parental interest. The framework protects the right of children to continue relationships with a nonparent, even in cases where a fit natural parent is present.

In affirming the statute, the Court asserted that a finding of abuse or neglect is not necessary to grant a parental interest to a nonparent.[413] Also, the nonparent does not need to stand in the place of the parent (*in loco parentis*[414]) to the exclusion of the natural parent to establish a child-parent relationship.[415] Rather, the nonparent must establish, through clear and convincing evidence that: (1) the natural parent engaged in conduct contrary to the child-parent relationship, (2) the nonparent established a child-parent relationship with the child, and (3) continuing that relationship furthered the best interest of the child.[416]

Michelle Kulstad and Barbara Maniaci began living together in 1996.[417] The couple celebrated their domestic relationship by exchanging rings, which they wore until 2006.[418] The two considered co-parenting a child, and the opportunity to adopt L.M. presented itself in 2001.[419] One of Maniaci's chiropractic patients asked if the couple would adopt her great-grandson.[420] After L.M.'s natural mother relinquished custody of L.M. to them, the couple took him to the hospital and entered his name as L.L. Kulstad-Maniaci.[421] The couple's attorney informed them only one of the

412. *Kulstad v. Maniaci*, 220 P.3d 595 (Mont. 2009).

413. *Id.* at 603.

414. *Black's Law Dictionary* defines *in loco parentis* as: "[o]f, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent." *Black's Law Dictionary* (Bryan A. Garner ed., 8th ed., West 2004).

415. *Kulstad*, 220 P.3d at 609.

416. Mont. Code Ann. § 40–4–228(2)(a)–(b) (2009).

417. *Kulstad*, 220 P.3d at 597.

418. *Id.* at 597.

419. *Id.* at 597.

420. *Id.*

421. *Id.* at 597.

women could legally adopt L.M.[422] The parties agreed Maniaci would be the adoptive parent, but they would function equally as parents to L.M.[423] A few years later, Maniaci adopted a baby girl from Guatemala and brought A.M. into their family.[424]

During the adoption process for both children, the couple participated in a home study and in the case of L.M., an adoptive post-placement report.[425] At all times Maniaci represented that she and Kulstad were in a committed relationship and they would co-parent and support the children.[426]

The couple shared responsibility for the children and jointly provided for their physical, psychological, and developmental needs.[427] Maniaci cared for the children during the day while Kulstad worked, and Kulstad cared for the children most afternoons, evenings, and weekends.[428] Kulstad named Maniaci and the children in her will and her life insurance policy.[429] Kulstad also claimed L.M. as a dependant on her tax returns with Maniaci's full knowledge and consent.[430]

Kulstad initiated dissolution and parenting proceedings January 19, 2007.[431] The district court refused to adjudicate a dissolution between the couple because same-sex marriages are not recognized under Montana law.[432] However, the parties moved forward on the issues of whether Kulstad had a parental interest in the children and whether her relationship with the children necessitated an interim parenting plan.[433] The court found, by clear and convincing evidence, that: (1) a child-parent relationship existed between Kulstad and the two children, (2) an interim parenting plan served the best interest of the children, and (3) Montana Code Annotated § 40–4–228 applied to the adjudication of a final parenting plan.[434]

On appeal, Maniaci argued Montana Code Annotated § 40–4–228 violated her fundamental rights as a natural parent by failing to determine "fitness" before granting a nonparent (Kulstad) a parental interest based on the best interest of the child.[435] She asserted "adopted children have no consti-

422. *Id.*
423. *Kulstad*, 220 P.3d at 597.
424. *Id.* at 598.
425. *Id.* at 597–598.
426. *Id.*
427. *Id.* at 598.
428. *Id.*
429. *Kulstad*, 220 P.3d at 598.
430. *Id.*
431. *Id.* at 599.
432. *Id.* at 599.
433. *Id.* at 599.
434. *Id.* at 600.
435. *Kulstad*, 220 P.3d at 603.

tutionally protected rights, absent a showing of abuse, neglect, or dependency."[436] On examination of the amended statutes, the Court concluded the application of Montana Code Annotated § 40–4–228 was not confined to cases of abuse or neglect.[437] Rather the amended statutes require the party seeking a parental interest to establish the existence of a child-parent relationship.[438]

To bolster her contention, Maniaci offered several cases where the Montana Supreme Court upheld a natural parent's rights over the claim of a third party: *Matter of Guardianship of Doney*, *In re A.R.A.*, and *Girard v. Williams*.[439] The Court specifically distinguished Kulstad's circumstances from the precedent relied on by Maniaci on the grounds that "[a] third party in each of these cases attempted to secure custody of the minor children to the exclusion of the biological parent. The parties, in essence, sought to terminate the parental rights of the biological parent based upon the best interests of the child."[440] Kulstad did not seek to terminate Maniaci's parental rights.[441] Instead, Kustad sought a parental interest so she could continue her relationship with the children. Moreover, the Court refused the precedent because the cases predated the 1999 amendments to the statute.[442]

Maniaci offered *In re Parenting of J.N.P.*[443] as proof that the Court rejected the constitutionality of the 1999 amendments.[444] In *J.N.P.* the Court affirmed the district court's ruling that a natural parent could not be denied custody without a finding of abuse or neglect.[445] Here again, the parties wanted actual custody of the child, not a parental interest.[446] Failing to meet the pre-requisite of establishing a child-parent relationship barred the parties from seeking custody under the nonparental statutes.[447]

The Court also rejected Maniaci's proposition that the Court should follow *Troxel v. Granville*[448] and declare the statutory scheme unconstitutional.[449] "Montana's legislature has chosen to enact the nonparenting stat-

436. *Id.*

437. *Id.* at 604.

438. *Id.*

439. *Id.* at 603; *Matter of Guardianship of Doney*, 570 P.2d 575 (Mont. 1977); *In re A.R.A.*,919 P.2d 388 (Mont. 1996); *Girard v. Williams*, 966 P.2d 1155 (Mont. 1998).

440. *Id.* at 603.

441. *Kulstad*, 220 P.3d at 599.

442. *Id.* at 603.

443. *In re Parenting of J.N.P.*, 27 P.3d 953 (Mont. 2001).

444. *Kulstad*, 220 P.3d at 604.

445. *In re Parenting of J.N.P.*, at 958.

446. *Kulstad*, 220 P.3d at 604.

447. *Id.*

448. *Troxel v. Granville*, 530 U.S. 57 (2000).

449. *Kulstad*, 220 P.3d at 606.

utes. Maniaci has failed to carry her burden of proving beyond a reasonable doubt that the statutes she challenges impermissibly infringe on her constitutional right to parent her children."[450] Furthermore, the statutory scheme advances the policy of Montana by attempting to "balance the parent's rights with the constitutionally protected rights of the child to determine the best interests of the child."[451]

Maniaci presented the issue of whether Kulstad could establish a child-parent relationship under the *in loco parentis* doctrine.[452] She argued Kulstad needed to demonstrate that "Maniaci voluntarily had permitted her children to remain continuously in the exclusive care of Kulstad for a significant period of time in order for Kulstad to have established a child-parent relationship."[453] Maniaci further insisted that the Court has defined *in loco parentis* as a "person who acts as a parent to the exclusion of the natural parent."[454] The Court rejected Maniaci's limited interpretation of *in loco parentis* by asserting "[n]one of the decisions of this Court have defined *in loco parentis* status to require a third party acting as a parent to the exclusion of the natural parent. We decline to read this requirement in § 40–4–228(4), MCA."[455] In addition the Court stated that a finding of *in loco parentis* was not mandatory to meet the requirements of the statute, but rather an example of one of many ways a natural parent may act contrary to the child-parent relationship.[456]

The Court affirmed the findings that Maniaci acted contrary to her child-parent relationship by relinquishing her exclusive parenting authority to Kulstad.[457] The Court also agreed with the district courts findings that Kulstad established a child-parent relationship by functioning as parent to the children from the day they came into the family and that the children would "suffer irreparable harm should the court deny parenting to Kulstad."[458] Having met all of the requirements, the Court granted Kulstad a parental interest.

Dissenting, Justice Rice claimed the decision weakened the constitutional rights of parents and would "open a Pandora's Box of potential attacks upon the right of fit and capable parents to raise their own chil-

450. *Id.* (citing *In re Custody and Parenting Rights of D.S.*, 122 P.3d 1239, 1242–1243 (Mont. 2005)).

451. *Id.* at 604.

452. *Id.* at 608.

453. *Id.*

454. *Id.*

455. *Kulstad*, 220 P.3d 609.

456. *Id.*

457. *Id.* at 607.

458. *Id.* at 609.

dren."[459] Rice's parade of horribles suggests fit parents will be forced to defend against weak claims of third parties[460] and claims from numerous adult parties and "[m]ultiple-party clusters raising children, or polyamorous 'families,'"[461] are "inevitable."[462] The statutory scheme, however, safeguards children against unsubstantiated claims of third parties by requiring proof of a child-parent relationship through clear and convincing evidence.[463] Likewise, the statute protects against environments which would be detrimental to the well-being of the child, by requiring the parental interest be in the best interest of the child.[464]

In his concurring opinion, Justice Nelson chose to address the "elephant in the room."[465] He asserted gays and lesbians should not have to battle for the same fundamental rights, such as raising children and establishing a family, which Montana's heterosexual citizens enjoy without question.[466] Nelson spoke passionately against the deplorable legal status of Montana's gays and lesbians by stating:

> Naming it for the evil it is, discrimination on the basis of sexual orientation is an expression of bigotry. And, whether rationalized on the basis of majoritarian morality, partisan ideology, or religious tenets, homophobic discrimination is still bigotry. It cannot be justified; it cannot be legalized; it cannot be constitutionalized.[467]

The Montana practitioner should be aware that after establishing the existence of a child-parent relationship, a third party need not demonstrate abuse or neglect to petition for a parenting interest. Also note the Court refused to define *in loco parentis* as requiring the voluntary relinquishment of a child to the exclusion of the natural parent. More importantly, *Kulstad v. Maniaci* recognizes, through application of strict statutory requirements, the right of children to maintain child-parent relationships with those whom they love regardless of their nontraditional legal status.

—Jain Walsh

459. *Id.* at 612 (Rice, J., dissenting).
460. *Id.* at 616.
461. *Kulstad*, 220 P.3d at 617.
462. *Id.*
463. Mont. Code Ann. § 40–4–228(2)(a)–(b).
464. Mont. Code Ann. § 40–4–228.
465. *Kulstad*, 220 P.3d at 610 (Nelson, J., concurring).
466. *Id.* at 611.
467. *Id.*